

# Aleksandr Butovenko vs. Ukraine

## Facts

On 24 December 1999, the author, a Ukrainian national, was arrested on suspicion of having committed a murder. His co-accused, R.K., was arrested on the same day, allegedly confessed in writing to have committed the murder and stated that the author was the mastermind and perpetrator of the murder.

After an interrogation conducted by the police, in the absence of a lawyer and without having been informed of his rights, the author was placed for three days in a punishment cell, where the conditions of detention were inappropriate (the author had to sleep on the floor wrapped in his own clothes, with no heating or glass in the windows, despite winter temperatures, and the noise of constantly dripping water). The interrogations continued day and night in the absence of a lawyer and the author was subject to physical (beatings, suffocating techniques) and psychological pressure (deprivation of food and water, threats to his family, beatings on his brother in the contiguous room). Unable to withstand this treatment, the author incriminated himself in the murder.

On 27 December 1999, the author was allowed to see for the first time a lawyer appointed *ex officio*. However, this lawyer was ineffective as he refused to request a medical examination for his client and only advised the author to say what the inquiry officers wanted him to say if he wanted the ill-treatment to cease. In January 2000, the author's co-accused, Mr. R.K., died in custody. According to the official version he committed suicide, but the author believes that his co-accused died as a result of the unlawful methods of investigation used on him, resulting in a false confession. In February 2000, after being transferred to different cells where the conditions of detention were equally inappropriate, the author submitted a written complaint to the Regional Prosecutor's Office. Only a superficial investigation was conducted. No criminal proceedings with regard to the unlawful actions of the police were initiated.

In March 2000, the author's family hired another lawyer. In the presence of this new lawyer, the author retracted his self-incriminating testimony. In September 2000, the Kiev Regional Court conducted a preliminary hearing. Criminal Law does not allow the participation of either the accused or his/her lawyer during this hearing. On 21 December 2000, the Kiev Regional Court convicted the author on the counts of robbery with violence and premeditated murder under aggravated circumstances. He was sentenced to life imprisonment and the seizure of his property. The author submitted a cassation appeal to the Supreme Court against this judgment. The appeal was unsuccessful.

## Consideration of admissibility

**Art.5 §2(a) of the Optional Protocol (OP) in relation to Art.7 and Art.10 of the Covenant:** In reply to the State's argument that the victim had not exhausted the domestic remedies with regard to allegations of inhuman conditions of detention, the

## Key words

- Torture and ill-treatment
- Fair hearing
- Presumption of innocence
- Preparation of defense
- Right to defense
- Access to witness
- Self-incrimination
- Retroactivity of the law
- Arbitrary detention
- Conditions of detention

## Relevant Provisions

- Article 2 §3
- Article 7
- Article 9 §1
- Article 10
- Article 14 §1 - §3 (b)(d)(e)(g)
- Article 15 §1

## Violated Provisions

- Article 7
- Article 9 §1
- Article 10 §1
- Article 14 §1 §3 (b)(d)(e)(g)

Committee referred to its case-law indicating that ‘the State party must describe in detail which legal remedies would have been available to an author in the specific case and provide evidence that there would be a reasonable prospect that such remedies would be effective’ (e.g. No. 006/1977 [Sequeira v. Uruguay](#) 1980). The State party, however, failed to explain how civil proceedings could have provided redress in the present case. The Committee therefore concluded that the claims in relation to conditions of detention were admissible.

**Art. 2 OP in relation to Art.14 §1, 3(b) and (d) of the Covenant, read in conjunction with Art.2 §3(a):** The author did not sufficiently substantiate his claim that his and his lawyer’s non-participation in the preliminary hearing of his criminal case resulted in a violation of his rights, as it was not proved that the merits of his case had been dealt with during this hearing. For the same reasons, his claim that the participation in the proceedings of the first instance court of the same judge and the two assessors who conducted a preliminary consideration of his case was in violation of Art.14 §1 of the Covenant was not sufficiently substantiated. This part of the communication was considered therefore inadmissible.

**Art.2 OP in relation to Art.14 §1 §3(d) of the Covenant.** The author’s allegations that neither he nor his lawyer took part in the examination of his objections to the trial transcript of the first instance court, whereas the prosecutor did, were also considered inadmissible since the author did not explain how this affected the determination of the criminal charges against him.

**Art.2 OP in relation to Art.14 §3(b) (d) of the Covenant, read in conjunction with Art.14 §1 and Art.2 §3(c):** With regard to the author’s claim that he was not allowed to take part in the cassation proceedings and could not, therefore, defend himself in person, the Committee noted that he was represented at that hearing by his privately hired lawyer and his mother. Moreover, he was able to present cassation appeals. Therefore, the Committee found this part of the communication inadmissible.

## Consideration of merits

**Art.7 and Art.14 §3(g) of the Covenant:** With regard to the State’s argument that the author did not provide any evidence in support of his allegations of being subjected to ill-treatment in order to confess guilt, the Committee reaffirmed its jurisprudence (e.g. No. 030/1978 [Bleier v. Uruguay](#) 1980) that ‘the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information’. The Committee recalled that ‘in case of alleged forced confessions, the burden is on the State to prove that statements made by the accused have been given of their own free will’. Since the State did not provide any arguments corroborated by relevant documentation to refute the author’s claim, the Committee found a violation of the articles above-mentioned.

**Art.7 read in conjunction with Art.2 §3 of the Covenant:** The Committee recalled that a State ‘is responsible for the security of any person in detention and, when an individual claims to have received injuries while in detention, it is incumbent on the State party to produce evidence refuting these allegations’ (No. 907/2000 [Siragev v. Uzbekistan](#), 2005). Moreover, ‘complaints of ill-treatment must be investigated

promptly and impartially by competent authorities' ([General Comment 20](#)). Since the author provided a detailed description of the treatment to which he was subjected and the State failed to investigate, the Committee found a violation of the articles above-mentioned.

**Art.9 §1 of the Covenant:** The Committee noted that, under the Criminal Procedure Code, a suspect is to be promptly interrogated and he / she has to be assigned a lawyer within 24 hours after the arrest. It further noted the author's claim, which was not contested by the State, that he was *de facto* interrogated by the police inquiry officers for three days after his arrest in the absence of a lawyer and investigator, and without having been informed of his rights. In the circumstances, the Committee found a violation of the article mentioned above.

**Art.10 §1 of the Covenant:** The Committee took note of the author's allegation, which was not refuted by the State, that the conditions of detention were inappropriate. It recalled that persons deprived of their liberty must be treated in accordance with minimum standards ([General Comment No. 21](#)) and these standards were not met in the case at hand. Consequently, the Committee found a violation of the article above-mentioned.

**Art.14 §3(b) and (d) of the Covenant:** The author claimed that he did not have access to any lawyer for 72 hours and to a lawyer of his choice for more than two months, that he was imposed an *ex officio* lawyer who was taking part in the proceedings only *pro forma* and that there were no legal grounds for assigning him an *ex officio* lawyer. Since the author also presented evidence indicating that he complained about the ineffectiveness of his *ex officio* lawyer, contrary to what the State contended, the Committee concluded that the facts before it disclosed a violation of the article mentioned above.

**Art.14 §1 and 3(e) of the Covenant:** Regarding the author's claim that his trial was unfair, the Committee noted that neither the Regional Court nor the Supreme Court excluded the inculpatory evidence that was obtained under undue pressure. The Committee recalled its jurisprudence that it is generally not for the Committee, but for the domestic courts, to review or to evaluate facts and evidence, unless it can be ascertained that the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice (e.g. No. 541/1993 [Errol Simms v. Jamaica](#) 1995). In this case, the evaluation of inculpatory evidence against the author by the domestic courts reflected their failure to comply with the guarantees of a fair trial, as established by the Committee earlier regarding Art.14 §3(b) (d) (g) of the Covenant. The Committee, therefore, concluded that the facts before it disclosed a violation.

**Art.15 §1 of the Covenant:** The author claimed that, if the relevant penalty has changed more than once between the time when the crime was committed and his conviction, he should benefit from the most favorable law. The Committee noted that the death penalty became void on 29 December 1999, according to a Constitutional Court's decision. However this decision did not replace the death penalty with a lighter penalty (see also No.1346/2005 [Tofanyuk v. Ukraine](#) 2010). Therefore, the law in force from 29 December 1999 until the enactment of the new law of 22 February 2000, replacing death penalty for life imprisonment, could not be considered a 'provision [...] made by law for the imposition of a lighter penalty', as established in

Art.15 of the Covenant. Moreover, the penalty of life imprisonment fully respected the purpose of the Constitutional Court's decision because it is a less severe penalty than capital punishment. Consequently, there were no other provisions made by law for the imposition of a lighter penalty from which the author could benefit. Therefore, the Committee found no violation of the above-mentioned Art.7.

## Conclusions

The Committee found that the State violated the rights of the author not to be subjected to ill-treatment in order to confess guilt (Art.7 and Art.14 §3(g)) and not to be ill-treated while in detention (Art.7 and Art.2 §3), since it did not discharge the burden of refuting the author's allegations, as in these cases the burden of proof is reversed. The State violated also Art.9 §1, since the author was *de facto* interrogated in the absence of a lawyer and without having been informed of his rights. The inadequate conditions of detention constituted also a violation of Art.10, and the author's right to communicate and defend himself with a counsel of his own choosing (Art.14 §3 (c) (d)) was also infringed, since he was imposed an *ex officio* lawyer who acted only *pro forma*. Despite the Committee's settled position to leave the evaluation of evidence to domestic courts, the failure to exclude inculpatory evidence obtained under duress at domestic level and the violation of the procedural guarantees above-mentioned justified a violation of Art.14 §1 §3(e).

In accordance with Art.2 §3(a) of the Covenant, the State party had the obligation to provide the author with an effective remedy. The remedy should include a review of his conviction that would comply with fair trial guarantees of Art.14 of the Covenant, impartial, effective and thorough investigation of the author's claims under Art.7, prosecution of those responsible and full reparation including appropriate compensation. The State party was also under an obligation to prevent similar violations in the future.

## Dissent/Concurrence

N/A